# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY CHARLES ALLEN,

Defendant-Appellant.

UNPUBLISHED
September 18, 2003

No. 242159
Livingston Circuit Court
LC No. 01-012097-FC

Before: Sawyer, PJ., Hoekstra and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions, finding defendant guilty but mentally ill, for first-degree felony murder, MCL 750.316(1)(b), assault with intent to commit great bodily harm less than murder, MCL 750.84, second-degree murder, MCL 750.317, first-degree home invasion, MCL 750.110a(2), and four corresponding counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the felony murder conviction, 4½ to 10 years' imprisonment for the assault conviction, and two years' imprisonment for two of the felony-firearm convictions.[1] We affirm.

## I. Dispositional Instructions

Defendant first argues that he was denied his due process right to a fair trial because the jury should have been instructed on the disposition of a defendant found guilty but mentally ill. Although defendant contends that this issue was preserved on appeal, defendant failed to raise this claim as an objection at trial on the record. *In re Hildebrant*, 216 Mich App 384, 389; 548 NW2d 715 (1996). Therefore, this issue will not be reviewed absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). In order to avoid forfeiture of an unpreserved issue, a defendant must establish that an error occurred, the error was plain, i.e., clear or obvious, and the error affected the defendant's substantial rights, i.e., the error affected the outcome of the trial proceedings. *Id*. at 761-764. If a defendant is able to meet the requirements of this test, an appellate court must exercise its discretion in determining whether to reverse. *Id*. at 763. "Reversal is warranted only when the

[1] Defendant's sentences for the remaining counts were vacated.

plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."'" *Id*. (citations omitted).

In *People v Goad*, 421 Mich 20, 25; 364 NW2d 584 (1984), the Michigan Supreme Court addressed the issue of whether the trial court erred in instructing the jury concerning the consequences of a verdict of not guilty by reason of insanity. The Court determined that it was improper for a trial court to instruct the jury on the potential disposition of a defendant after the verdict, noting that "neither the court nor counsel should address themselves to the question of the disposition of a defendant after the verdict." *Id*. at 32-37. Further, the Court concluded that it is proper for a trial court to instruct the jury that they are not to speculate on such matters and that they must confine their deliberations to the issue of guilt or innocence. *Id*. at 25-26.

In the year following the *Goad* decision, the Michigan Supreme Court indicated that dispositional instructions regarding a defendant found guilty but mentally ill were also improper, and held that jurors "should not be instructed on the disposition of a defendant found guilty but mentally ill." *People v Ramsey*, 422 Mich 500, 519-520; 375 NW2d 297 (1985). In accordance with the reasoning and holdings set forth in *Goad* and *Ramsey*, the trial court could not instruct the jury regarding the disposition of a defendant found guilty but mentally ill in connection with the long-standing rule that jurors should not concern themselves with the consequences of their verdict. Indeed, the disposition of a defendant after trial is an irrelevant and inconsequential matter, and the jury should only be concerned with determining whether the elements of the charged crime were proven beyond a reasonable doubt. *Goad*, *supra* at 27. Accordingly, defendant has failed to demonstrate a plain error affecting his substantial rights.

Defendant also argues that the jury instructions were misleading because, in the absence of a dispositional instruction, the trial court instructed the jury that "the law treats people who commit crimes differently depending on their mental state at the time of the crime." Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred; instructions are not to be extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

After reviewing the instructions, we find that defendant has taken the statement out of context. The trial court merely instructed the jury on the difference in the definitions of mental illness and legal insanity. It is equally clear that the instructions, when reviewed in context, did not relate, in any way, to defendant's disposition following the jury's verdict.

II. Insanity Statute

Defendant next argues that Michigan's statutory scheme regarding the insanity defense violated his due process right to a fair trial because sanity is an implicit element of an offense, and due process requires that the prosecution prove implicit elements beyond a reasonable doubt. Defendant failed to raise this issue at trial; accordingly, this issue is reviewed for plain error. *Carines*, *supra*; *Hildebrant*, *supra*.

"Legal insanity is an affirmative defense requiring proof that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked 'substantial capacity either to appreciate the nature and quality of the wrongfulness of his or her conduct or

conform his or her conduct to the requirements of the law.'" *People v Carpenter*, 464 Mich 223, 231; 627 NW2d 276 (2001), citing MCL 768.21a(1). Additionally, the statute provides that the defendant has the burden of proving the insanity defense by a preponderance of the evidence. *Id*., citing MCL 768.21a(3).

In *People v Lemons*, 454 Mich 234, 248 n 21; 562 NW2d 447 (1997), the Michigan Supreme Court briefly addressed the issue of whether the prosecution must disprove at least an element beyond a reasonable doubt once the defendant satisfied his burden of production or whether the defendant also bears the burden of persuasion on the defense by a preponderance of the evidence. The Court observed that "due process is not offended where the state places the burden of persuasion on the defendant with respect to an affirmative defense such as insanity." *Id*., citing *Leland v Oregon*, 343 US 790, 797-798; 72 S Ct 1002; 96 L Ed 1302 (1952); *Mullaney v Wilbur*, 421 US 684; 95 S Ct 1881; 44 L Ed 2d 508 (1975). In accordance with *Lemons*, due process has not been offended, and defendant has failed to demonstrate a plain error affecting his substantial rights.

Defendant's reliance on *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), is misplaced. Contrary to defendant's argument, *Apprendi* does not hold that due process requires that any factual determination that subjects a defendant *to punishment* or increases the maximum penalty becomes an element of the offense, which must be submitted to a jury and proven beyond a reasonable doubt. Rather, *Apprendi* is limited to instances where a factual determination increases the penalty for a crime *beyond the prescribed statutory maximum*. Therefore, *Apprendi* is not applicable to the instant case because nothing increases the penalty for felony murder, second-degree murder, or first-degree home invasion.

Defendant also ignores that the *Apprendi* Court briefly discussed its implications on cases involving the interpretation of affirmative defenses in a criminal context. See *Patterson v New York*, 432 US 197; 97 S Ct 2319; 53 L Ed 2d 281 (1977); *Mullaney*, *supra*; *In re Winship*, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970). The *Apprendi* Court noted that in *Patterson*, *supra*, where the Court upheld a New York law allowing defendants to raise and prove extreme emotional distress as an affirmative defense to murder, the Court made it clear that the state law still required the state to prove every element of that state's offense of murder and its accompanying punishment. *Apprendi*, *supra* at 485 n 12. The Court further stated that in *Patterson*, no further facts were either presumed or inferred in order to constitute the crime. *Id*.

In accordance with the *Lemons* and *Apprendi* analysis, we conclude that defendant failed to demonstrate a plain error affecting his substantial rights. As noted by *Lemons*, affirmative defenses such as the insanity defense do not violate principles of due process. Further, *Apprendi* places no limitation on the Legislature's power to enact legislation regarding affirmative defenses such as insanity. Accordingly, defendant has failed to demonstrate a plain error affecting his substantial rights, and has forfeited this issue on appeal.

Defendant also contends that he was denied due process because the jury was not informed that it could consider evidence of his mental state when considering whether the prosecution had proven that defendant acted with a premeditated intent to kill. Defendant's argument is not clear, and defendant has provided extremely general citations to support his argument. It is not for this Court to discover and rationalize the basis for defendant's claims.

MCR 7.212(C)(7); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Therefore, we decline to address this argument.

III. Home Invasion Jury Instructions

Defendant next argues that the trial court erred in instructing the jury because suicide is not a felony that may be the underlying felony of a home invasion conviction. Defendant has failed to preserve this issue on appeal because he failed to raise this objection at trial. MCL 768.29; MCR 2.516(C); *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). Accordingly, this issue is reviewed for plain error affecting defendant's substantial rights. *Carines*, *supra*.

Regardless of whether suicide is a common law felony in Michigan, we find that defendant has failed to demonstrate that any such error in instructing the jury to that effect affected his substantial rights. At trial, after the prosecutor requested an amendment of the felony information regarding the home invasion count to require entry without permission rather than breaking and entering, defense counsel presented no objection to the proposed amendment, and stated, "The defense is not, the actual defense is the insanity defense, so it really doesn't make any difference to our defense." Additionally, during closing arguments, defense counsel conceded defendant's intent to kill his wife, Cindy Allen, and himself. Specifically, defense counsel stated, "[Defendant] didn't intend to kill anyone, other than himself *and his wife* and the only reason *he intended to kill his wife* was because he knew that she was uncap-, incapable of taking care of the two people most important to him, his children. . . . The intent to kill himself is there, *the intent to kill Cindy is there.* That's the irrationality. That's the goal." (Emphasis added.)

Here, defendant's entry with the intent to commit murder, manslaughter, or suicide, was never an issue at trial. Further, the record does not indicate in any way, which party requested that "suicide" be included within the first-degree home invasion jury instruction. Defense counsel could have easily requested that suicide be included in the instruction in order to boost defendant's insanity defense. Therefore, given defense counsel's open admission that defendant entered Kirk Williams' home with the intent to kill Cindy and himself and the fact that this intent was never an issue at trial, defendant has failed to demonstrate that the trial court's instruction affected his substantial rights. *Carines, supra*.[2]

Defendant also argues that the jury did not find that defendant had an intent to murder at the time of his illegal entry because the jury found defendant not guilty of first-degree premeditated murder regarding Williams and of assault with intent to commit murder regarding Cindy. This argument defies reason, however, in that defendant concededly entered Williams' home with the intent to murder Cindy and then to kill himself. Therefore, defendant's intent at

[2] Further, there was sufficient evidence admitted at trial, including defendant's answering machine message during which defendant stated, "So, I am going to kill [my wife] and then I'm going to kill myself," which would render any error harmless. Defendant even concedes on appeal that substantial evidence was presented to establish that defendant intended to commit suicide when he entered the house.

the time he entered Williams' home could be different than at the time he committed the other offenses. Finally, defendant's argument that the trial court erred when it failed to instruct the jury that the manslaughter it was referring to was voluntary also fails because the trial court only provided instructions for voluntary manslaughter and not involuntary manslaughter. It is reasonable to assume that the jury would infer that the trial court's instruction related to voluntary manslaughter. Again, defendant has failed to demonstrate a plain error affecting his substantial rights. *Carines*, *supra*.

IV. Involuntary Manslaughter

Defendant next argues that the trial court erred when it did not sua sponte instruct the jury on involuntary manslaughter. Defendant failed to raise such an objection at trial; hence, this issue is reviewed for a plain error affecting defendant's substantial rights. *Carines*, *supra*; *Snider*, *supra*.

In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), the Michigan Supreme Court discussed the interpretation of MCL 768.32(1) with respect to jury instructions on necessarily included[3] or cognate lesser included offenses. The Court held, in accordance with MCL 768.32, that a "requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *Id*. at 357.

In *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003), the Michigan Supreme Court recently explained that manslaughter was an "inferior offense of murder because manslaughter is a necessarily included lesser offense of murder." *Id*. The Court reaffirmed the *Cornell* principle that "[a]n inferior-offense instruction is appropriate only when a rational view of the evidence supports a conviction for the lesser offense." *Mendoza*, *supra* at 545.

Accordingly, an instruction for involuntary manslaughter would be appropriate in this case only if a rational view of the evidence supports a conviction for that offense. In *People v Datema*, 448 Mich 585, 594-596; 533 NW2d 272 (1995), the Michigan Supreme Court clarified the term "involuntary manslaughter," and explained:

> "the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty." [Citation omitted.]

In describing involuntary manslaughter, the *Datema* Court indicated that the definition sets forth three theories that give rise to involuntary manslaughter. *Id*. at 596.

[3] A necessarily lesser included offense is defined as an offense whose elements are completely subsumed in the greater offense. *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003); *Cornell*, *supra* at 356.

Here, defendant does not indicate under which theory an instruction for involuntary manslaughter would be supported, but merely argues that there was evidence that the instruction would be supported because there was evidence that the gun was fired accidentally. Defendant contends that an involuntary manslaughter conviction would have been supported by the evidence that there was a struggle between defendant and Williams and that the lowest of the three gunshots was fired from the closest range while the remaining gunshots were fired from an increasingly greater range.

We conclude that the evidence was insufficient to support an instruction on involuntary manslaughter. Here, defendant entered Williams' home late at night with the intent to kill Cindy and then kill himself. Defendant approached Cindy as she slept on the couch, and Cindy yelled for Williams. Williams entered the area where defendant was located, and four shots were fired from defendant's weapon, a semi-automatic nine millimeter gun. Williams was shot three times, including once near his upper lip, once below the breastbone, and once in the lower chest that hit the liver, small intestine, and kidney. The act of discharging a weapon three or four times at a person is certain to cause death or great bodily harm. Additionally, there was no evidence that defendant negligently performed a lawful act or negligently omitted to perform a legal duty. *Datema, supra.* Therefore, the trial court did not commit error by failing to instruct the jury on involuntary manslaughter based on the facts of this case. Accordingly, defendant has failed to demonstrate a plain error affecting his substantial rights.

## V. Ineffective Assistance of Counsel

Defendant next argues that defense counsel was ineffective for failing to object to the trial court's erroneous instructions on the elements of first-degree home invasion and felony murder, failing to request instruction on the disposition of a defendant found guilty but mentally ill and/or failing to object to the trial court's refusal to give the requested instruction, and failing to object to the trial court's failure to instruct on involuntary manslaughter or to request that such an instruction be given. Defendant failed to raise this issue in his motion for a new trial and failed to bring a motion for a *Ginther* hearing; accordingly, this issue is reviewed for a plain error affecting defendant's substantial rights. *Carines*, *supra*; *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000); see also *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). "To demonstrate ineffective assistance of counsel, defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived of a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Rockey, supra* at 76-77.

Defendant raises several claims of error in support of his argument that defense counsel was ineffective, in connection with the previous issues. As previously discussed, defendant has failed to demonstrate any plain error affecting his substantial rights. Further, even if there was error in relation to defendant's argument that defense counsel was ineffective for failing to

determine that suicide is not a felony in Michigan, defendant has again failed to demonstrate a plain error affecting his substantial rights.

Defense counsel continually stressed that the defense was insanity. Defense counsel conceded that defendant's intent to kill himself or to kill Cindy was not at issue, and instead continued to argue defendant's insanity. It is impossible to determine which party requested that suicide be included in the instruction; however, regardless of which party requested the instruction, defense counsel would not be ineffective based on such a request or failure to object. It was reasonable for defense counsel to focus on defendant's suicidal intent to bolster the insanity defense. Although the strategy was ultimately unsuccessful, defense counsel cannot be said to be ineffective for focusing on defendant's insanity defense. Because this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, defendant has failed to show that defense counsel was ineffective and has failed to demonstrate a plain error affecting his substantial rights.

## VI. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction of assault with intent to commit great bodily harm less than murder. MCL 750.84. Defendant merely contends that there was no evidence presented to establish that defendant attempted, with force and violence, to do corporal hurt to Cindy.

This Court reviews issues regarding the sufficiency of evidence de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (2000).

> Assault with intent to commit great bodily harm less than murder requires proof of (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). Assault with intent to commit great bodily harm is a specific intent crime. *People v Mack*, 112 Mich App 605, 611; 317 NW2d 190 (1981). [*People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997).]

An assault is further defined as "'either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). No actual injury is required to establish the elements of assault with intent to commit great bodily harm. *Harrington, supra* at 430.

We find that there was sufficient evidence presented to support defendant's conviction for assault with intent to commit great bodily harm less than murder. As noted by the prosecution, defendant's argument centers around the existence of an assault rather than on his intent to commit great bodily harm less than murder.

Here, evidence demonstrated that defendant found Cindy with their son, T.C., after defendant shot Williams three times. Defendant, still brandishing the weapon he used to kill Williams, ordered T.C. to go to the front of the house and said that he was going to shoot Cindy. Although defendant did not shoot in Cindy's direction or point the gun at her, under the circumstances of this case, the evidence demonstrates a threat with force or violence to do corporal harm to another. Further, based on defendant's actions and the surrounding circumstances of this case, it would be reasonable for the jury to find that Cindy was placed in apprehension of receiving an immediate battery. Therefore, after reviewing this evidence in a light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction for assault with intent to do commit great bodily harm less than murder.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray